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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of STEPHEN and VANESSA HONDA.	
STEPHEN HONDA, Appellant, v. VANESSA HONDA, Respondent.	G046315 (Super. Ct. No. 11D003856) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Kim R. Hubbard, Judge. Affirmed.

Stephen Honda, in pro. per., for Appellant.

Wayne A. Siggard for Respondent.

Following a hearing, the trial court granted a five-year restraining order prohibiting Stephen Honda from coming within 100 yards of the person, home, vehicle, job, children or children's school, and parakeet of his former wife, Vanessa Honda. The court also ordered Stephen[1] to attend and complete a 52-week batterer intervention program, and granted custody of the couple's three minor children to Vanessa with restrictions on Stephen's visitation.

Stephen challenges the sufficiency of the evidence to support the trial court's order granting Vanessa's request for a restraining order and its child custody determination. He also claims the trial court exhibited bias against him during the hearing and denied him due process of law. We find these assertions meritless for the reasons stated below and affirm the trial court's orders.

FACTS AND PROCEDURAL HISTORY

Sometime before April 2011, Vanessa took the couple's three children from the family home and went to a battered women's shelter. She filed an application for a domestic violence temporary restraining order against Stephen.[2] The trial court granted the request and set the matter for a hearing to be held later that month. Stephen, who was

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[1] We refer to the parties by their first names throughout the opinion for clarity and intend no disrespect.

[2] Stephen failed to provide an adequate record to support many of his claims. Most notably, he failed to include Vanessa's affidavit in support of her request for a temporary restraining order, his request for a restraining order, the trial court's final order regarding child custody, and various pertinent minute orders. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.] Consequently, plaintiff has the burden of providing an adequate record. [Citation.] Failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

then represented by Ronald B. Funk, filed an answer, a 35-page affidavit in support of his answer, and 48 pages of exhibits. Stephen alleged Vanessa provided inaccurate and falsified records and violated the temporary restraining order by contacting him. Stephen provided a lengthy recitation of his version of the events leading up to Vanessa's departure, which generally denied any allegations of abuse.

The hearing was continued until August 22, although we cannot determine from the record how many times or for what reasons. On August 22, Vanessa appeared for the hearing with her counsel, Daniel Hunter, and five witnesses. Stephen appeared with his attorney. The hearing lasted three days, with vigorous cross-examination of the witnesses and parties by both attorneys. Stephen presented one witness to rebut a statement made by Vanessa during her testimony.

At the end of the hearing, the court ruled: "All right. The standard for a civil domestic violence restraining order is by a preponderance of the evidence. Counsel are aware that's the lowest standard we have. It simply means that it's more likely than not that domestic violence has occurred." The court then provided a lengthy recitation of the evidence, which we present in full:

"According to what the court has heard from [Vanessa] and from the witnesses mirrors the classic power and control generally seen in domestic violence cases.

"This seems to be somewhat complicated in this case, however, by admissions from both parties that some of the things that were done were done pursuant to advice of a counselor that they were both going to at the time.

"Also, in the last couple of days of testimony, both parties have taken some hits to their credibility.

"[Vanessa] stated very specifically yesterday that when talking with Lindsey – I don't know how to pronounce that last name, which is why I'm not – specifically that Lindsey told her that [Stephen] asked her to call and speak to [Vanessa]

regarding this matter. Lindsey specifically refuted that on the stand today. She said that she never said that.

"I might be able to say that it was an inference, a reasonable inference that was drawn by [Vanessa]; however, she's also stated that she did not have the feeling that the pastor said that Steve asked her to contact her directly, that she inferred that, but she did not know if the pastor had asked directly. Yet, the statement was made that Lindsey flat out was asked. That apparently did not happen.

"There's also been some lack of credibility on [Stephen's] part, particularly the court will note that today he has admitted that he did, in fact, break into one of her e-mail accounts and change her passwords, that he did know what G.P.S.[global positioning system] was, some minor things, but the court looks at a 'he said/she said' situation and tries to look at it very plainly.

"So what we need to do in this matter is, go to the testimony of the witnesses.

"The first witness we heard was [Vanessa's] cousin, Rebecca Van Uitert, [I] think, was the last name. That testimony is that she lives in Chicago, and it appears to the court that she flew out here specifically for this purpose; that [Vanessa] called her in November of 2010; [Vanessa] was crying and sounded panicked; [Vanessa] stated [Stephen] had been threatening her and verbally abusing her; and she thought that she was out of the home because [Vanessa] was calling from a place where she could hear traffic in the background. She then heard a car pull up and a door slam, heard her say 'oh, no it's [Stephen],' and then the phone went dead.

"[Stephen] has said that when he pulled up, the phone had already hung up. I have some problems with that.

"I also do not find any lack of credibility in what Ms. Van Uitert stated to the court as to what she had heard; and, further, that later [Stephen] called her back and was yelling at her that he didn't approve of the friendship; she was not allowed to talk to

her again. Also, that [Vanessa] was not allowed to leave that night. Quite specifically she stated that. She then said she also told [Stephen] that his behavior was not okay; it was not oaky to record [Vanessa], and monitor correspondence, was not all right to have sex with her unless she wanted to have sex with him, and that she had advised her cousin go to a D.V. [domestic violence] shelter.

"I've heard nothing that would impeach the testimony of Ms. Van Uitert. And, frankly, the court has some difficulty in believing that she would go to the time and expense of flying out here from Chicago to get on a stand in California under oath and lie.

"Sheena Sales was then called by [Vanessa]. She did admit that she's one of [Vanessa's] best friends, lived in the same apartment community, and that she was a second shooter for the photography business.

"She has stated that there was some normalcy, particularly during the photo shoot in July of 2010 during the shoot, but after that the client had offered to take them to dinner, and they went, and that during that dinner [Vanessa] called [Stephen]. They could hear [Stephen] yelling at her. She started crying, and he kept calling back, and that she didn't want to go home. They had to wait for an hour to order until they got him off the phone.

"She also stated that they were in the kitchen and arguing because he found a can of black beans that had sugar. Sugar was not allowed in the house.

"[Stephen] has testified that he did not want junk food. This was an agreement between the parties; that there would not be junk food or sugar because he noticed a change in his middle daughter. The agreement they reached was that there would be a cupboard where there would be space for that food, and she would have the combination so that only she could let the kids in or out of that.

"That does not appear to me to have anything to do with a can of black beans that have sugar. Junk food, things with sugar, that might make some sense, but

Ms. Sales is testifying that there was this argument over a can of black beans that had sugar. Well, that's more to the court – and, again, I did not hear that disputed at any point. That was more to the court than junk food or food with a lot of sugar.

"He said he did not ban all sugar. Well, that's a discrepancy that I don't particularly like there.

"Not being able to sing in the choir, we have a discrepancy on that. Ms. Sales also said that he tried to cut off all contact in December; that she was not to go to a photo shoot, and he would be the assistant from now on.

"The problem I have there is that [Stephen] has testified that the only thing they agreed not to talk to somebody else about would be things regarding their marriage. And yet, not only Ms. Van Uitert, but Ms. Sales stated [he] was cutting off [all] communication. That's not the same thing.

"We then had the testimony of Lisa Antocci. Ms. Antocci has no reason, that the court can determine, to come in here and lie under oath. She's a very credible witness on two separate occasions. The first event that caused her concern was January/February of 2011. They went to lunch – she went to lunch with [Vanessa], and the phone kept ringing. And after lunch when [Vanessa] answered the phone, they could hear [Stephen] yelling saying her G.P.S. said she wasn't where she said she was, kept calling her a liar; that she hung up, and he kept calling back, and it scared the witness.

"Then a month later she came to the store to pick up equipment, and, again, Ms. Antocci heard a phone call where [Stephen] was screaming at her that she was lying about where she was. The witness actually offered to be a safe haven for [Vanessa], as [Stephen] did not know where she lived.

"Then we have the therapist Mr. Huisken. And Mr. Huisken did state that he told the parties that their marital issues were not to be discussed with anyone else, but he did not tell [Stephen] communication would be cut off with friends and family, and that's what the witnesses and the family members have testified to.

"Then I think we get to [Vanessa's] witness, Danielle Eastmond. She also lived in the same apartment complex. They lived next door and then on the same level after that. She talked about an incident where Kate, one of the daughters of the couple, and her daughter were to be in a Christmas program together, but that daughter had to stay home and clean the toilets because she did not pick out an outfit to wear; also, that she stored food items for [Vanessa] the whole time she lived there.

"Well, if she had a cupboard with a combination lock on it in their kitchen, pursuant to their agreement that she would have control over that solely, why was she storing food items for [Vanessa]? Again, I have no reason to disbelieve the testimony of Danielle Eastmond.

"She then stated that she lost virtually all contact with [Vanessa] just before Thanksgiving 2010 and then briefly after Christmas. Oddly, she also testified that the parties were to go on a hike together with Ms. Eastmond and her husband, and that [Stephen] showed up there before [Vanessa]. Then [Vanessa] came in, and [Vanessa] and [Stephen] went into their bedroom – the bedroom of the Eastmonds – for about 20 minutes to have a conversation about this, which made them very uncomfortable. It would have made me uncomfortable too.

"I don't see any reason to disbelieve any of the witnesses who testified. They all seemed to be credible witnesses to me. And because they were all credible witnesses, this swings to the fact that it's more likely than not that this behavior occurred.

"The court finds that there has been domestic violence; that [Stephen] has been the perpetrator; and that it is appropriate to issue the restraining order for a five year period."

With respect to custody and visitation, the court lifted a previously imposed requirement of monitored visitation, but also appointed an attorney for the children to determine if any physical violence had occurred in their presence. The trial court granted Stephen's request for unmonitored visitation to occur six hours each week pending a

review hearing and a report from the children's attorney. In November 2011, the trial court denied Stephen's in propria persona motion for a new trial, and this appeal followed.[3]

DISCUSSION

Sufficiency of the Evidence

Stephen first challenges the sufficiency of the evidence to support the trial court's findings and orders. "A reviewing court applies the substantial evidence standard of review to a trial court's factual findings, 'regardless of the burden of proof at trial.' [Citations.] Our sole inquiry is 'whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted,' supporting the court's finding. [Citation.] 'We must accept as true all evidence . . . tending to establish the correctness of the trial court's findings . . . , resolving every conflict in favor of the judgment.' [Citation.]" (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823.)

When applying the sufficiency of the evidence standard, our "power . . . *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact" that is attacked on appeal. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, original italics.) Moreover, all factual matters are to be viewed most favorably to the prevailing party and in support of the order; all issues of credibility are for the trier of fact. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) And, the testimony of

[3] Stephen's notice of appeal states the appeal is from a court trial on August 26, 2012. The notice was filed in January of 2012. Consequently, we presume Stephen made a typographical error and intended to appeal from the orders entered following the August 26, 2011 hearing.

one witness, even that of a party, may be sufficient to support the findings of the trial court. (*In re Marriage of Slivka* (1986) 183 Cal.App.3d 159, 163.)

In addition, an appellate court presumes the order appealed from is correct and "'all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is appellant's burden to affirmatively demonstrate error and, where the evidence is in conflict, [we] will not disturb the trial court's findings. [Citations.]' [Citation.]" (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 486.) Considered in the light most favorable to Vanessa, the evidence contained in the appellate record is sufficient to support the trial court's decision.

As the trial court's factual summary reveals, each witnesses' testimony and credibility was carefully considered, including the testimony provided by the parties. Vanessa testified to several incidents of Stephen's controlling, angry behavior, and provided evidence he stalked her and forced her to have sex. Vanessa's witnesses generally supported Vanessa's versions of events, and the trial court found these witnesses to be credible. Stephen denied the allegations, but the trial court did not, with minor exceptions, believe him. Stephen would have us reweigh the evidence, but "'we have no power to judge . . . the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.' [Citations.]" (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518; see also *Cochran v. Rubens*, *supra*, 42 Cal.App.4th at p. 486.)

Due Process, Alleged Court Bias, and Asserted Incompetence of Counsel

Stephen's brief contains numerous claims the trial court deprived him of due process, subjected him to "trial by ambush," and exhibited bias against him. With respect to court bias, he points to the fact Vanessa's attorney gave a time estimate of a half-day court trial, and argues the length of the hearing forced his attorney to ask fewer questions on cross-examination. He also claims Vanessa's attorney failed to provide a

witness list, which prevented him from being adequately prepared for their testimony. The appellate record supports none of these claims.

With regard to court bias, Stephen primarily focuses on a single incident that occurred at the conclusion of two days of testimony. The court stated, "The court is not happy with the egregious underestimation of the amount of time this was going to take. At this point in time, I have every right to mistry you and have you start over again. But, regrettably, the only people that harms are the clients." The trial court's impatience was understandable in light of the time estimate, but regardless of this statement, the hearing continued into a third day with no objection or discernable change in the questioning of either counsel. These facts distinguish the instant case from *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, on which Stephen relies.

Here, Stephen received notice of the proceedings, had ample time to prepare and present his case, and he utilized the services of competent counsel. As noted above, on appeal Stephen failed to designate Vanessa's declaration in support of her request for the restraining order, or provide any documents concerning an exchange of witness lists, but from our review of the entire reporter's transcript, this was not a trial by ambush. Rather, the appellate record reveals a well-prepared defense to specifically defined incidences. There is no evidence the trial court relied on testimony stricken from the record, or any matters outside the record. And, the trial court properly excluded evidence of Stephen's allegation Vanessa had an affair with a high school boyfriend. Without exception, the few quotations from the record Stephen includes are finely parsed and taken out of context. Thus, we reject his due process and judicial bias claims, and disagree with any denigrating characterization of his attorney's performance.

Stephen also claims the court used the wrong standard of proof, citing *Santosky v. Kramer* (1982) 455 U.S. 745, a case involving the termination of parental rights. However, "A reviewing court applies the substantial evidence standard of review to a trial court's factual findings, '*regardless of the burden of proof at trial*.' [Citations.]"

(*Sabbah v. Sabbah, supra,* 151 Cal.App.4th at p. 822, italics added.) He also claims the trial court ordered him to pay any fees charged by the children's attorney without first determining his ability to pay. He did not object to this order below, and provides this court with no evidence of an inability to pay. Therefore, this claim is waived.

Child Custody Order

Stephen also challenges the child custody order entered in conjunction with the domestic violence restraining order. He argues the court abused its discretion in awarding custody to Vanessa and limiting his visitation. He cites several cases for the proposition the parent/child relationship is a fundamental right, but the importance of the parent/child relationship is not the issue here. Based on the record provided by Stephen, we find no error.

It is well established that trial courts generally have the "widest discretion to choose a parenting plan that is in the best interest of the child." (Fam. Code, § 3040, subd. (c).) An appellate court must uphold the trial court's custody order if it can be "reasonably concluded that the order . . . advance[s] the 'best interest' of the child." (See *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *In re Marriage of Loyd* (2003) 106 Cal.App.4th 754, 758-759.) ""'An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the trier of facts. Only upon a clear and convincing showing of abuse of discretion will the order of the trial court in such matters be disturbed on appeal. Where minds may reasonably differ, it is the trial judge's discretion and not that of the appellate court which must control." [Citation.]' [Citation.]" (*Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.)

The evidence supports the trial court's custody award. Once the allegations of abuse had been sustained, the burden shifted to Stephen to demonstrate joint custody was in the children's best interest. (Fam. Code, § 3044, subd. (a), ["Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against

the other party seeking custody of the child, . . . there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child [to that person] is detrimental to the best interest of the child . . . ."].) Nothing in the record suggests he met and rebutted the presumption joint custody would not be in the best interests of the children.

Furthermore, the trial court ordered unmonitored visitation pending receipt of a report from the children's attorney. Stephen failed to include this report, or any orders from the continued proceedings in the record provided to us. Therefore, under the appropriate standard of review and in the absence of any contrary evidence, we presume the court's orders were correct. Stephen's claim the court was biased against him in making its ruling, and his attorney incompetent to present his case, are not supported by a reading of the entire record presented on appeal. Instead, the trial court gave thoughtful consideration to the pertinent issues and made a custody determination based on the appropriate factors. We find no abuse of discretion.

DISPOSITION

The trial court's orders are affirmed. Vanessa is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.